United States Court of Appeals

for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

77-7163

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B
P/S

LEO M. SHORE,

Plaintiff-Appellant,

-against-

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants.

PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF DEFENDANTS-APPELLEES FOR REHEARING AND REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 77-7163

LEO M. SHORE,

Plaintiff-Appellant,

-against-

PARKLANE HOSIERY COMPANY, INC., HERBERT N. SOMEKH, DENISE D. SOMEKH, HERBERT N. SOMEKH, as Trustee of trusts for the benefit of his children, CHARLES B. YAFFE, BEULAH YAFFE, DAVID N. DAVID, NEIL B. PERSKY, CARL APPEL, ESTHER APPEL, FLORENCE MUKAMEL, ARTHUR GOLD, STANLEY KUSCHNER and HAROLD STONE,

Defendants.

PARKLANE HOSIERY COMPANY, INC. and HERBERT N. SOMEKH,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION OF DEFENDANTS-APPELLEES FOR REHEARING AND REHEARING EN BANC

QUESTION CERTIFIED PURSUANT TO 28 U.S.C. §1292(b)

Whether the Court's findings of fact in a prior action commenced by the Securities and Exchange Commission ("SEC") can, by the doctrine of collateral estoppel, be applied to a subsequent action by a different plaintiff, seeking legal and equitable relief, based on the same transactions as was the action commenced by the SEC, when (a) there was no right to a jury trial in that action and (b) the Court found that the subject transaction was effected by means of materially misleading statements and omissions.

PETITION OF DEFENDANTS-APPELLEES
FOR REHEARING AND REHEARING EN BANC

Defendants-Appellees ("defendants") respectfully petition this Court for rehearing and rehearing en banc of the decision ("Decision") reversing the denial below (Wyatt, J.) of plaintiff's motion for summary judgment which had sought, through collateral estoppel, to extinguish defendants' Seventh Amendment jury trial right.

With the greatest respect, we submit that this Court misapprehended the inviolate nature of said Seventh Amendment right, and that as a result, the Decision and its reasoning were erroneous. As we will respectfully also show, the constitutional principles enunciated by the Supreme Court have long since rejected the principal ground upon which the Decision was based, namely, that a stranger to an earlier-tried action, in which there was no right to a jury trial, may deprive a party of its jury trial right in a second action on the sole ground that the issues had been tried in a full and fair first trial to a court alone.

Preliminary Statement

Plaintiff's motion for summary judgment contended that defendants were collaterally estopped from trying to a jury the issue of liability here on the basis of adverse findings in an earlier-tried SEC enforcement action,[1] notwithstanding the fact that in said action a jury trial right did not exist; that said action was tried to the court alone; and that plaintiff had not been a party thereto.

The Court below, in denying plaintiff's motion, relied upon Rachal v. Hill, 435 F.2d 59 (5th Cir. 1970), cert. denied, 403 U.S. 904 (1971), a case squarely in point. Rachal had held that collat-

1. Securities and Exchange Commission v. Parklane Hosiery Company, Inc. et al. 422 F.Supp. 477 (1976), aff'd, 558 F.2d 1083 (2d Cir. 1977).

eral estoppel could not be invoked to deprive defendants of their right to a jury trial on the basis of adverse findings in a prior SEC enforcement action because (a) defendants had not been entitled to a jury trial in the earlier action and (b) the plaintiff had not been a party to that earlier action.

This Court, flatly disagreeing with Rachal, stated that the Court of Appeals for the Fifth Circuit had mistakenly relied upon, and misinterpreted the significance of, Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). Op. at 166-68.[2] However, as will hereinafter be seen (pp. 8-10 infra), Meeker v. Ambassador Oil Corp., 375 U.S. 160 (1963), rev'g mem., 308 F.2d 875 (10th Cir. 1962), confirms that the Fifth Circuit correctly interpreted Beacon Theatres and, in so doing, correctly upheld the jury trial right.

This Court's misapprehension of defendants' jury trial right may also be seen in the question stated in the Decision which, unlike the question which had been certified, not only (a) failed to mention that there was no jury trial right in the SEC enforcement action, but (b) was based upon a consideration -- deemed irrelevant by the Supreme Court in Meeker, supra -- that the earlier trial to the court alone had afforded a full and fair opportunity to litigate the issues. Thus, this Court wrote:

> "This appeal raises the important question of whether a party who has had issues of fact determined against it after a full and fair opportunity to litigate them in a non-jury trial of an action against it may, in a different suit against it by another person, obtain a jury trial of the same issues of fact arising out of the same transaction." Op. at 158-59.

It is respectfully submitted that the Seventh Amendment, as inter-

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2. References herein to the Slip Opinion appear as follows: "Op. at ."

preted by the Supreme Court, requires an affirmative answer to that question.

It is also respectfully submitted that this Court erred in suggesting that, to protect their jury trial right against waiver, defendants either (a) should have demanded a jury trial in the SEC enforcement action, though a jury trial right did not exist in that action, or (b) should somehow have had this action tried before the SEC action, though the action here was not -- and even today is not -- ready for trial and the SEC action would have been thereby delayed for an indeterminate period.

POINT I

The constitutional right of trial by jury in this action was erroneously extinguished in derogation of the Seventh Amendment's preservation of that right as it existed in 1791 when the Amendment was adopted.

The Decision suggests that, where a claim of collateral estoppel is asserted in a private action for damages under the federal securities laws on the basis of findings in an SEC enforcement action, the existence of a jury trial right in such a private action cannot be determined by reference to the state of the law in 1791 when the Seventh Amendment was adopted. Thus, this Court wrote that in respect of actions under the federal securities laws, it cannot "by reference to 1791 precedents, determine what jury trial and collateral estoppel rules would have been developed or applied by common law courts of that period." Op. at 173.

In so stating, it is respectfully submitted that this Court overlooked the decisions of the Supreme Court which clearly demonstrate (a) that a Seventh Amendment jury trial right does exist in

respect of claims for damages brought under post-1791 statutes,[3] (b) that the scope of that jury trial right must be determined by resort to the rules of the common law in 1791[4] and (c) that, in 1791, where, as here, there was no mutuality of estoppel,[5] collateral estoppel could not have been invoked, and, hence, could not -- as was done here -- have extinguished a jury trial right.[6]

Notwithstanding those firmly established principles, this Court, in reversing the Court below, speculated as to whether the 1791 courts might have created an exception to the requirement of mutuality by easing it to permit the use of SEC-obtained findings in a subsequent private action. Op. at 173. However, it is clear from decisions of the Supreme Court that the 1791 courts would not have created any such exception.

In 1791, collateral estoppel could only apply where there was mutuality.[7] Hence, where, as here, there was no mutuality, collateral estoppel could not affect the right of trial by jury. While

3. Curtis v. Loether, 415 U.S. 189, 192-94 (1974); see Schine v. Schine, [1969-70 Transfer Binder] CCH Fed.Sec.L.Rep. ¶92,552 (S.D.N.Y. 1970); Richland v. Crandall, 259 F.Supp. 274 (S.D.N.Y. 1966) (Mansfield, J.).

4. "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." Dimick v. Schiedt, 293 U.S. 474, 476 (1935); see Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654 (1935).

5. Mutuality of estoppel means that "unless both parties (or their privies) in a second action are bound by a judgment in a previous case, neither party (nor his privy) in the second action may use the prior judgment as determinative of an issue in the second action." Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 320-21 (1971).

6. See Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 127 (1912); Mutual Benefit Life Insurance Co. v. Tisdale, 91 U.S. 238 (1876); Brooklyn City and Newtown R.R. Co. v. Nat'l Bank of the Republic of N.Y., 102 U.S. 14 (1880); Barr v. Gratz's Heirs, 17 U.S. 213 (1819).

7. Id.

the Decision notes that the 1791 law courts "respect[ed] decrees and findings in equity" (Op. at 174), it has overlooked the fact those courts refused to give such decrees and findings any estoppel effect in the absence of mutuality. Nor is there any basis for speculating -- as this Court has -- that the 1791 courts might have created an exception to the mutuality requirement simply because it was the government which had obtained a prior judgment. In Tisdale, supra, the Supreme Court illustrated the principle that a private litigant could not benefit, through estoppel, from a government-obtained judgment, with the following example:

> "If an indictment for an assault and battery by A upon B is prosecuted to a trial and conviction, the record is conclusive evidence in favor of A upon a subsequent indictment for the same offense; but, if B sues A for the same assault and battery, it cannot be doubted that it would be incompetent to introduce that record as evidence of the offense. For this purpose, it is inter alios acta. B was no party to that proceeding. In theory of law he was not responsible for it, nor capable of being benefitted by it." 91 U.S. at 244. (emphasis added)

Moreover, in the very article cited in the Decision (Op. at 163, 174), the authors, referring to the state of the law in 1791, wrote, in respect of Rachal v. Hill, supra, as follows:

> "[L]imitations on the doctrine of collateral estoppel - in particular the doctrine of mutuality - would have made it impossible for [plaintiff] to deprive [defendants] of a jury on the issue of liability in an analogous proceeding in 1791..."[8] (emphasis added)

The fact that relatively recently the common law requirement of mutuality of estoppel has been relaxed in some instances[9] cannot affect, let alone extinguish, defendants' right to jury trial of the issues here. Those instances did not involve a question of

8. Shapiro and Coquillette, The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill, 85 Harv.L.Rev. 442,454 (1971).

9. See Blonder-Tongue, supra, 402 U.S. at 322-27 and cases cited at Op. 164.

the jury trial right, and in no instance has the jury trial right been denied through any relaxation of the mutuality requirement. The Supreme Court has made it crystal clear that the constitutionally preserved right to a jury trial is supreme and could not be lost through a post-1791 change in a common law doctrine. Thus, in Dimick, supra, the Supreme Court wrote:

> "It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions. Funk v. United States, 290 U.S. 371, 78 L.ed 369, 54 S. Ct. 212, 93 A.L.R. 1136. But here we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by jury as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution." 293 U.S. at 487. (emphasis added)

In denying defendants the benefit of the unswerving principles enunciated in Dimick, this Court (Op. at 172-73) has relied upon a demonstrably irrelevant difference between the claim in Dimick -- a personal injury case -- and the claim here. Since here, as in Dimick, the constitutional jury trial right exists, the fact that the claims are different cannot impair the applicability in each case of the principles enunciated in Dimick. The very language of Dimick shows that the principle of the supremacy of the jury trial right over any changes which might be made in the common law is applicable to all cases where the jury trial right exists.

Misapprehending Dimick and subsequent Supreme Court decisions, e.g., Curtis v. Loether, supra, holding that the Seventh Amendment

jury trial right "shall be preserved," as it existed in 1791, this Court apparently thought Ross v. Bernhard, 396 U.S. 531 (1970), "somewhat weakened" that requirement and could justify this Court's unprecedented denial of the jury trial right as it existed in 1791. Thus, the Decision states:

> "[A] strict historical approach to the Seventh Amendment, which would freeze the jury trial at its 1791 level -- no more, no less -- has been somewhat weakened by recent pronouncements. See, e.g., Ross v. Bernhard, 396 U.S. 531 (1970), where the Court found that because of the 'extensive and possibly abstruse historical inquiry' involved, such an analysis is 'most difficult to apply.' 396 U.S. at 538 n. 10." Op. at 171-72.

It is respectfully submitted, however, that Ross, did not, in any respect, "weaken" the requirement of the historical inquiry. Rather, Ross simply stated that the historical inquiry happened to be the "most difficult" to apply among three factors bearing upon the question whether a particular issue was "'legal'" in nature. As the Court, in Ross, wrote:

> "Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply." 396 U.S. at 538 n. 10. (emphasis added)

It is one thing to say, as in Ross, that the "required" historical inquiry is difficult; it is an entirely different matter to say, as this Court has, that because a principle is difficult to apply the principle has been "weakened."

Ross simply stands for the proposition that an enlargement of the jury trial right beyond its 1791 level is consistent with the Seventh Amendment.[10] It cannot support what has happened here,

10. In Ross, the Court held there was a jury trial right in a stockholders' derivative suit for damages, though such actions were traditionally cognizable only in equity and, consequently, had not been triable to a jury as of right.

namely, a contraction of that right which constitutes a violation of the Seventh Amendment mandate that the jury trial right "shall be preserved." Since "the right to jury trial is a constitutional one ... while no similar requirement protects trials by the c[illegible]c"[11] (emphasis added), the jury trial right may be expanded, but may not be contracted.[12]

POINT II

This Court misapprehended the principle that where a party has preserved its right to a jury trial, but the issues have been tried to a court alone, that party has the right to a second trial of the same issues to a jury, regardless of the fact that the first trial of those issues had been full and fair.

This Court, here, and the Fifth Circuit, in Rachal v. Hill, supra, arrived at their conflicting results on the basis of diametrically opposite interpretations of the Supreme Court's decision in Beacon Theatres, supra. While the Rachal Court found Beacon Theatres to exemplify the Supreme Court's great respect for the jury trial right, 435 F.2d at 64, and upheld it against collateral estoppel, this Court thought that Beacon Theatres evidenced the Supreme Court's "inherent respect for the doctrine of collateral estoppel" (Op. at 169) and denied the jury trial right. As between these two positions, the Supreme Court, in Meeker, supra, showed that the position of the Rachal Court was the correct one.

In Beacon Theatres, the Supreme Court held that, in a single

11. Beacon Theatres, Inc. v. Westover, supra, 359 U.S. at 510.

12. It is respectfully submitted that this Court's reliance upon Bloom v. Illinois, 391 U.S. 194 (1968) (Op. at 172) is likewise misplaced. Bloom enlarged the Sixth Amendment jury trial right to accord it in actions where it had not existed in 1791. Indeed, in the very passage from Bloom quoted in the Decision, the Supreme Court contrasted Thompson v. Utah, 170 U.S. 343 (1898) where, upon an historical analysis, it held an attempted contraction of the 1791 jury trial right to be impermissible. 391 U.S. at 200 n.2.

action presenting federal anti-trust claims for equitable relief and a related counterclaim and cross-claim for legal relief, mandamus should issue to compel a jury trial of the common issues. Because in Beacon Theatres there was mutuality, had the trial court first tried the issues common to the equitable and legal claims, defendant might have been collaterally estopped from fully trying his legal claim to a jury. 359 U.S. at 503-4. To preserve the jury trial right against possible destruction by estoppel, the Court held that the common issues should be tried first, to a jury. Accord, Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

Significantly, neither Beacon Theatres nor Dairy Queen reached the question whether the right to a jury trial of the common legal and equitable issues would actually have been lost if the equitable claims had first been tried to a court alone. Nevertheless, this Court assumed that had the equitable claims been tried first in Beacon Theatres, the jury trial right, in fact, would have been lost. Op. at 168. Meeker, supra, disproves that assumption.

In Meeker, plaintiffs asserted both legal and equitable claims, which presented common issues. Though plaintiffs had demanded a jury, the trial court decided that it would try the equitable claim first without a jury. Unlike Beacon Theatres and Dairy Queen, plaintiffs, in Meeker, went to trial without seeking appellate review. The trial court then tried and determined the equitable claim -- and perforce the common issues -- adversely to plaintiffs. As a result, plaintiffs were precluded from relitigating those issues to a jury on the legal claim. Plaintiffs thereupon appealed, claiming that they had been denied their jury right. The Court of Appeals rejected that contention. 308 F.2d at 884.[13]

13. The facts in Meeker are discussed in the Court of Appeals opinion, 308 F.2d 875; see 5 Moore's Federal Practice ¶38.11[8-6] at 128.13 (2d ed. 1977).

Though, in Meeker, there was no question that the plaintiffs had been accorded a full and fair trial by the court alone, the Supreme Court, on the basis of Beacon Theatres and Dairy Queen, reversed the Court of Appeals, and thereby preserved the jury trial right against destruction by estoppel.[14] As a result, plaintiffs were afforded a retrial, to a jury, of the very same issues which a court had determined adversely to them.[15]

Thus, it is seen from Meeker that where, as here, there is a right to a jury trial, it was error to deny defendants that right either (a) in reliance upon a finding, as stated by this Court, that defendants were "accorded a full and fair opportunity to try those issues in the prior [non-jury] proceeding" (Op. at 163, 165, 173), or (b) to serve considerations, mentioned in the Decision, such as finality and judicial economy. Op. at 169-70.

POINT III

This Court mistakenly concluded that defendants, to preserve their jury trial right in this action, should have either (a) demanded a jury trial in the prior SEC enforcement action where such a right did not exist or (b) expedited this action, which even today is not ready for trial.

Notwithstanding the fact (a) that a right to trial by jury did not exist in the SEC enforcement action and (b) that, at the time the trial of that action was ordered, this action was not ready for trial, this Court has concluded that there may have been a waiver of the Seventh Amendment jury trial right in this action. Op. at 170. In this regard, it is noteworthy that plaintiff certainly

14. It is thus obvious that this Court begged the question of collateral estoppel here by suggesting that since a court had once determined the issue of liability there were no genuine issues of material fact to be tried to a jury. Op. at 164-65.

15. The fact of the retrial appears in the District Court Docket, Civ. No. 8212 (W.D.Okla.), and the Judgment therein filed December 14, 1965.

did not claim, and the District Court did not find, any such waiver. That question was first raised by this Court, which did so on demonstrably untenable grounds.

First, while this Court has suggested that defendants might have "sought to expedite trial of the present action" (Op. at 170), presumably to take precedence over the trial of the SEC enforcement action, it is respectfully submitted that that suggestion is wholly unrealistic in light of the procedural posture of each of the cases and is contrary to the policy which requires SEC enforcement actions to be tried without delay.

The SEC enforcement action was commenced on May 5, 1976 and the trial thereof commenced on June 2, 1976. As of the time of the trial of that action, no discovery whatsoever had been conducted in this action and, to this day, there has been none. Clearly, there would have been no way, in the four weeks between the commencement and the trial of the SEC action, for the parties to have prepared for, and proceeded to, the trial of this action.

This is to say nothing of the fact that on May 20, 1976, plaintiff in this action moved to amend his complaint -- a motion which was not decided until September 7, 1976, months after the trial in the SEC action had been concluded. Plaintiff's amended complaint was not even served until October 1, 1976 and the answers thereto were not served until November 12, 1976.

Nor can it be said that defendants could have requested a delay in the trial of the SEC action until after this action was made ready for trial and tried.[16] Thus, in Everest Management,

16. See Securities and Exchange Commission v. Everest Management Corp., 475 F.2d 1236 (2d Cir. 1972); Securities and Exchange Commission v. General Host Corp., 60 F.R.D. 640 (S.D.N.Y. 1973), aff'd, 508 F.2d 1332 (2d Cir. 1975); Securities and Exchange Commission v. National Student Marketing Corp., 59 F.R.D. 305 (D.D.C. 1973).

supra, this Court would not even countenance any delay in an SEC enforcement action by permitting intervention by parties claiming to have been defrauded in the transaction complained of by the SEC. There, Judge Timbers, a member of the Panel here, wrote:

> "Appellants argue, accordingly, [on the basis of Rachal v. Hill, supra] that, unless intervention in the present SEC action is permitted, a total relitigation of the issues would be required in a subsequent action.
>
> Suffice it to say that in our view it is preferable to require private parties to commence their own actions than to have SEC actions bogged down through intervention." 475 F.2d 1240 n. 5. (emphasis added)

The same policy was sounded in General Host, supra, where the Court stated:

> "'As a matter of general policy, it is undesirable that SEC actions for injunctive relief, whose sole purpose is the expeditious safeguarding of the public interest, be subjected to the delays that are inherent in private litigations, with their different concerns, even where those private actions parallel the SEC complaints. . . . To lump the SEC action with the private lawsuit would result in a slowdown in its effort to protect the public; it would defeat rather than 'promote the just and efficient conduct' of the SEC litigation.'" 60 F.R.D. at 641-42. (emphasis added)

This Court has also suggested that defendants here should have requested Judge Duffy, who tried the SEC enforcement action, to exercise his discretion pursuant to Rules 39(b) or (c), Fed.R. Civ.P., to order the issues in that action tried by a jury or before an advisory jury. Op. at 170. It is respectfully submitted that that suggestion is also demonstrably untenable.

The discretion to order a jury trial under Rule 39(b), Fed. R.Civ.P., could not have been exercised in the SEC enforcement action. Rule 39(b) is expressly limited to "an action in which such a [jury] demand might have been made of right" (emphasis added),

and there was no such right in the SEC enforcement action.[17] Therefore, a jury demand under Rule 39(b), as this Court has suggested, would have been groundless.

The suggestion of an application for an advisory jury pursuant to Rule 39(c), Fed.R.Civ.P., (Op. at 170) is also of no significance. An advisory jury could have had no bearing whatsoever upon defendants' Seventh Amendment jury trial right. "By its nature, the function of an advisory jury is to enlighten the conscience of the trial court and the jury's verdict has no binding effect upon that court" (emphasis added).[18] Moreover, as this Court wrote in (American) Lumbermens, supra, even where an advisory jury is used, the "review on appeal is from the court's judgment as though no jury had been present."[19] 108 F.2d at 500. It is respectfully submitted that to substitute for a jury, which a party has as of constitutional right, an advisory jury, whose fact-finding is neither binding nor subject to review, would render the constitutional right illusory.

Finally, this Court's reliance upon Goldman, Sachs & Co. v. Edelstein, 494 F.2d 76 (2d Cir. 1974), cannot support its conclusion that trial of the SEC enforcement action, without objection by defendants, resulted "in the destruction by collateral estoppel of the defendants' right to a jury trial of the same issues". Op.

17. Securities and Exchange Commission v. Associated Minerals, Inc., [Current Transfer Binder] CCH Fed. Sec. L. Rep. ¶96,150 (E.D. Mich. 1977); Securities and Exchange Commission v. Petrofunds, Inc., 420 F. Supp. 958 (S.D.N.Y. 1976)(Weinfeld, J.).

18. 5 Moore's Federal Practice ¶39.10[3] (2d ed. 1977); Mallory v. Citizens Utilities Company, 342 F. 2d 796 (2d Cir. 1965); (American) Lumbermens Mutual Casualty Co. of Illinois v. Timms & Howard, Inc., 108 F.2d 497 (2d Cir. 1939).

19. See also Rule 52(a), Fed.R.Civ.P., which provides:
"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts...." (emphasis added)

at 175. As has been seen, there were no valid grounds upon which to object. Furthermore, the danger of waiver perceived in Goldman, Sachs was not present here. Since a jury trial right did not exist in the earlier-tried SEC action, there was no such right to be waived.[20]

In Goldman, Sachs, a jury trial right had been waived in one, but not the other of related cases where there were common defendants and common issues. This Court issued mandamus to provide for the trial of the jury case to protect against a claim of estoppel. In dissent, Judge Oakes indicated there was no need for mandamus since there was no danger of estoppel, stating:

> "No court has ever held, nor in my view will ever hold, that on the facts presented here petitioner would be foreclosed from litigating the facts before the jury in Welch." 494 F.2d at 79.

In this regard, the Supreme Court showed in Meeker, that even where mandamus is not sought, as it had been in Goldman, Sachs, Beacon Theatres and Dairy Queen, and the action is, in fact, first tried to the court alone, the jury trial right is not waived. Similarly, in National Union Electric Corp. v. Wilson, 434 F.2d 986, 988 (6th Cir. 1970), the Court, holding that the jury trial right will be upheld upon review even after a non-jury trial had occurred, wrote:

> "When the Court denied trial by jury, the appellants could have filed an action in mandamus

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20. In Goldman, Sachs, defendants had not requested a jury trial in Franklin, one of several related private actions, apparently with the understanding that another of those actions, Welch, in which a jury had been demanded, would be tried first. When the district court instead ordered Franklin to be tried first, defendants were in danger of having a non-jury determination of issues in Franklin, collaterally estop them in Welch. To prevent the possibility of what might have been an unwitting waiver in Franklin of defendants' jury trial right in Welch, this Court, finding that "no rational basis has been shown for not adhering to the anticipated order of trials or at least permitting the jury trial of the Welch case to proceed simultaneously with the non-jury trial of Franklin," 494 F.2d at 78, issued mandamus that Welch be tried first or simultaneously with Franklin.

> in this Court, or they could have moved to file an interlocutory appeal. Had they done either, they might have obtained the relief they are now seeking and thus they would have avoided the ten days' trial before the Court. Nothing in the papers before us, however, suggests that the defendants waived trial before a jury, and in our opinion they may review the order denying jury trial in an appeal taken after the rendition of judgment." (emphasis added; citations omitted)

It follows from Meeker, and the corresponding principle stated in Wilson, that where, as here, a jury trial right did not exist in the first of two separate actions, the jury trial right should likewise be upheld in this action without defendants having had to resort to any extraordinary measures prior to the trial of the first action in order to preserve their jury trial right in this action.

Here, in suggesting that the jury trial demanded in this action may have been waived by defendants, on the basis of an earlier-tried action in which there was no jury trial right, this Court has not only gone beyond what Judge Oakes stated no court would ever hold, but has misapprehended the unswerving constitutional principles uniformly enunciated by the Supreme Court where the jury trial right was at issue.

Conclusion

For the foregoing reasons, it is respectfully submitted that defendants' petition for rehearing and rehearing en banc should be granted; that, upon rehearing, the question certified to this Court should be answered in the negative; and that the decision of the District Court should be affirmed.

Respectfully submitted,

JACOBS PERSINGER & PARKER
Attorneys for Defendants-Appellees

Of Counsel:
Irving Parker
Joseph N. Salomon
Norman Trabulus

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH N. SALOMON, being duly sworn, deposes and says:

That he is not a party to the action, is over 18 years of age, and resides at 185 West End Avenue, New York, New York; and that on the 14th day of November, 1977, deponent served two copies of the annexed Petition for Rehearing and Rehearing En Banc upon

Kass, Goodkind, Wechsler & Gerstein
Attorneys for Plaintiff-Appellant
at
122 East 42nd Street
New York, New York 10017

the address designated for that purpose, by depositing two true copies of the same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States postal service within the State of New York.

Joseph N. Salomon
JOSEPH N. SALOMON

Sworn to before me this
14th day of November, 1977

Norman Trabulus
Notary Public

NORMAN TRABULUS
Notary Public, State of New York
No. 31-4611415
Qualified in New York County
Commission Expires March 30, 1979